IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 620

JAMES L. MOORE, ET AL.,

Plaintiffs,

vs.

SAMUEL SHAPIRO, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF ILLINOIS, ET AL.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANTS' BRIEF.

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OPINION BELOW.

The opinion below is not yet reported. A copy of the opinion is at pages 62-68 of the Appendix. The opinion was filed on October 3, 1968. The order of dismissal appealed from was entered on October 1, 1968.

JURISDICTION.

This is an appeal from an order entered on October 1, 1968 by a three-judge District Court in the Northern District of Illinois denying a request for preliminary injunc-

tive relief, denying a prayer for Declaratory Judgment, and dismissing the complaint for failure to state a cause of action. Notice of Appeal was filed on October 4, 1968. (Appendix, pp. 69-70.) A copy of the order appealed from is at pages 60-61 of the Appendix.

Jurisdiction of this Court to review the order on direct appeal is conferred by 28 U. S. C. Section 1253. (Appendix, p. 8.)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

This case involves a challenge to the constitutionality of Article 10, Section 3 of the Illinois Election Code on the ground that it violates Section 1 of Amendment XIV to the United States Constitution. (Appendix, p. 1.) The pertinent part of Article 10, Section 3 of the Illinois Election Code, as amended in 1935, reads as follows:

> Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; Provided, however, that included in the aggregate total of 25,000 signatures are the signatures of 200 qualified voters from each of at least 50 counties within the State.

QUESTIONS PRESENTED.

1. Is the Supreme Court's decision in *MacDougall* v. *Green*, 335 U. S. 281 (1948) still the law? Has not Justice Douglas' dissent in that case been adopted by this Court as a valid statement of the principles governing this cause?

2. Does the 1935 Amendment to Section 3 of Article 10 of the Election Code of Illinois, requiring that nomination

petitions for independent candidates for statewide office must contain not less than 200 signatures from each of at least 50 counties, constitute an arbitrary, unreasonable, and discriminatory restriction on the right of the Illinois voters to nominate and vote for candidates of their own choice in violation of Amendment XIV to the United States Constitution, and particularly the privileges and immunities, equal protection of the laws, and due process clauses thereof?

STATEMENT OF THE CASE.

This suit was filed as an action for Declaratory Judgment under Section 2201 of the Judicial Code and for injunctive relief as authorized by Section 2202 of the Judicial Code. (Appendix, p. 9.) It was brought by twenty-six independent candidates for the offices of Electors of President and Vice-President of the United States from the State of Illinois. The defendants were the members of the State of Illinois Electoral Board, namely, Samuel Shapiro, Governor, Paul Powell, Secretary of State, Michael J. Howlett, Auditor of Public Accounts, Adlai E. Stevenson, III, Treasurer, William G. Clark, Attorney General, James A. Ronan, Chairman of the State Democratic Central Committee, and Victor L. Smith, Chairman of the State Republican Central Committee.[1] The Board is provided for by Section 7-14 of the Illinois Election Code, Ill. Rev. Stat., Chap. 46, Sec. 7-14. (Appendix, pp. 2-3.)

Electors of President and Vice-President of the United States were to be voted on at the General Election to be held on November 5, 1968. On August 5, 1968, pursuant to Article 10 of the Illinois Election Code, Appellants filed petitions with Appellees containing the names of 26,500 qualified voters who desired to have Appellants nominated

1. In the election held on November 5, 1968, Richard B. Ogilvie was elected Governor and William J. Scott was elected Attorney General. They have since assumed office.

as independent candidates for the offices of Presidential Electors. Prior to 1935, Section 3 of said Article 10 required that at least 25,000 electors sign a petition to nominate such candidates. In 1935 that statute was amended. The requirement of at least 25,000 signatures was retained, but the following proviso was added:

> Provided, that included in the aggregate total of twenty-five thousand (25,000) signatures are the signatures of two hundred (200) qualified voters from each of at least fifty (50) counties. (Ill. Rev. Stat. 1967, Chap. 46, Sec. 10-3.) (Appendix, pp. 7-8.)

This section provides the only means whereby qualified voters in Illinois can nominate independent candidates for statewide office. An identical place of residence requirement is contained in Section 2 of Article 10 with respect to nominating candidates of a new political party for statewide office. (Appendix, pp. 4-7.)

On August 16, 1968 Appellees ruled that Appellants could not be certified to the county clerks for the November 5, 1968 General Election on the sole ground that the petition

> does not contain signatures of 200 qualified voters from each of at least 50 counties within the State. Said petition only contains 24 counties with over 200 signatures. Therefore, said petition does not meet with the requirements of Section 10-3. . . . (Exhibit A of Complaint, Appendix, pp. 21-23.)

On August 22, 1968 the Complaint in this cause was filed and assigned to Judge William J. Lynch. (Appendix, pp. 14-23.) The Complaint prayed for a Declaratory Judgment holding and declaring: that the amendment to Section 3 of Article 10 requiring 200 signatures from each of at least 50 counties is unconstitutional in violation of the Fourteenth Amendment to the United States Constitution; that the decision of the State Electoral Board with respect

to the insufficiency of the nominating petitions is null and void; and that such petitions are valid and sufficient at law to have Appellants' names certified to the county clerks as candidates for the offices of Electors of President and Vice-President. The Complaint further prayed for a decree under Section 2202 of the Judicial Code, enjoining Appellees from refusing to certify Appellants to the county clerks for such purpose. Finally, the Complaint requested that a three-judge court be convened at the earliest possible opportunity pursuant to Sections 2281 and 2284 of the Judicial Code (Appendix, pp. 9-11) since Appellants were asking that enforcement of a state statute be enjoined.

On August 26, 1968, pursuant to notice of motion mailed to Appellees on August 22, attorneys for Appellants appeared before Chief Judge William J. Campbell, who was hearing emergency motions, and moved that the District Court advise the Chief Judge of the Court of Appeals for the Seventh Circuit of the application for injunctive relief to the end that a three-judge court be convened pursuant to Sections 2281 and 2284 of the Judicial Code. Chief Judge Campbell declined to grant relief and set the motion down for hearing before Judge Lynch fifteen days thereafter on September 10. (Appendix, pp. 24-27.) Judge Lynch heard and granted the motion on September 11. (Appendix, pp. 27-30.)

Pursuant thereto a three-judge district court was convened. (Appendix, p. 31.) By order of Judge Lynch, briefs were submitted to the three-judge court on September 26, 1968. (Appendix, pp. 32, 38-58.)

Thereafter, without hearing oral argument, the three-judge court issued its order on October 1, 1968. (Appendix, pp. 60-61.) The essence of the court's reasoning is contained in the following paragraph:

> Having jurisdiction of the subject matter and having

> considered the briefs and authorities submitted by the parties, the Court feels itself bound by *MacDougall* v. *Green*, 335 U. S. 281 (1948), wherein the Supreme Court upheld an identical provision, stating that "it is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality." 335 U. S. 283.

The court denied the request for preliminary injunctive relief, denied the prayer for Declaratory Judgment, and dismissed the complaint for failure to state a cause of action. It is these rulings which are at issue in this appeal.

The three-judge court stated that a memorandum opinion would follow. On October 3, 1968 the three-judge court issued its memorandum opinion. (Appendix, pp. 62-68.) Although amplified somewhat, the reasoning was substantially identical to that contained in the order.

SUMMARY OF ARGUMENT.

I.

The 1935 amendment to Section 3 of Article 10 of the Illinois Election Code, by its requirements with respect to place of residence of voters, drastically dilutes the right of a majority of Illinois' qualified voters to nominate candidates for statewide office and for Presidential Electors. Such dilution violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. While the facts in the present case are virtually identical to those in *MacDougall* v. *Green*, 335 U. S. 281 (1948), relied on by the three-judge court in dismissing the complaint, subsequent decisions by this Court have adopted the dissent of Justice Douglas in the *MacDougall* case as a valid statement of the principles governing this cause.

II.

More than 50 per cent of the total Illinois population and more than 50 per cent of Illinois registered voters reside in just one of the State's 102 counties; approximately 61 per cent reside in the state's five most populous counties; and approximately 93.4 per cent reside in the state's forty-nine most populous counties. Approximately 6.6 per cent reside in the fifty-three remaining counties. The 1935 amendment to Section 3 of Article 10 of the Illinois Election Code requiring 200 signatures from each of 50 counties to nominate candidates for statewide office and for Presidential Electors drastically debases the weight of qualified voters in the more populous counties, enables a minority of the voters to prevent the nomination of candidates preferred by the majority, and constitutes an arbitrary, unreasonable, and discriminatory restriction on the right of Illinois voters to nominate and vote for candidates of their own choice.

III.

Prior to the 1935 amendment, the Illinois Election Code provided that 25,000 signatures of qualified voters, counted on a statewide basis, were required to nominate candidates for statewide offices and for Presidential Electors. Invalidation of the 1935 amendment which added the weighted requirement of 200 signatures from each of 50 counties would not nullify the Election Code but would leave it intact in its original form. Appellants have satisfied the requirements of the Election Code except for the unconstitutional requirements added by the 1935 amendment.

ARGUMENT.

I.

The 1935 Amendment to Section 3 of Article 10 of the Illinois Election Code Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The three-judge court, in dismissing Appellants' petition and denying all requested relief, relied solely on this Court's decision in *MacDougall* v. *Green*, 335 U. S. 281 (1948).

The facts presented in the present case are virtually identical to those present in *MacDougall*. They vary only in that in 1948 the five most populous Illinois counties had 59 per cent of the registered voters; in 1968 they had 61 per cent. In 1948 the forty-nine most populous counties had 87 per cent of the registered voters; in 1968 they had 93.4 per cent. As in the present case, Appellants in the *MacDougall* case were seeking to be certified to the county clerks for a Federal and statewide election without obtaining 200 signatures from each of 50 counties as required by the 1935 amendment to Article 10 of the Illinois Election Code.

While the facts in the two cases are virtually identical, in the twenty years since the *MacDougall* case, the law has changed considerably. In the *MacDougall* case this Court, by a vote of six to three, affirmed the District Court's denial of an interlocutory injunction and dismissal of the complaint on the basis of *Colegrove* v. *Green*, 328 U. S. 549 (1946), and *Colegrove* v. *Barrett*, 330 U. S. 804 (1946). Justice Rutledge concurred with the majority on the ground

that the Court should decline to exercise its jurisdiction in equity. Justice Douglas, with whom Justices Black and Murphy concurred, dissented, and it seems manifest that the statement of the law urged in that dissent is now the law of the land.

It may be that Justice Frankfurter's opinion at page 554 in the 1946 *Colegrove* case that judicial enforcement of equality of voting power would constitute "pernicious . . . judicial intervention in an essentially political contest dressed up in the abstract phrases of the law" actually stated the ruling of that case. If it did, this Court, in the 1962 case of *Baker* v. *Carr*, 369 U. S. 186 (1962), drastically changed the focus for viewing cases which involve political issues. The question in such cases, said this Court at page 226, "is the consistency of state action with the Federal Constitution." This Court held that complainant's allegation that the state's apportionment act resulted in a classification of voters which favored those in some counties over others presented a justiciable cause of action under the equal protection clause of the Fourteenth Amendment.

Since the *Baker* decision, this Court and many District Courts have held numerous state statutes which classified voters and weighted votes on the basis of place of residence for purposes of nomination or election to be unconstitutional, enjoined their enforcement, and ordered elections consistent with the principle of one man, one vote. (See Annotation, "Inequalities in Population of Election Districts or Voting Units as Rendering Apportionment Unconstitutional," 12 L. ed. 2d 1282.)

In *Reynolds* v. *Sims*, 377 U. S. 533 (1964), this Court affirmed the holding of a three-judge court that the existing and proposed apportionment provisions for the Alabama legislature were unconstitutional because they conflicted with the equal protection clause of the Fourteenth

Amendment, and affirmed its order for a temporary reapportionment. The existing and proposed statutes apportioned state representatives and senators among districts and counties so that voters in the more populous counties did not elect their proportionate share of representatives and senators. As stated at 377 U. S. 555:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

This Court dealt squarely with the unconstitutionality of place-of-residence requirements such as that of the 1935 amendment to the Illinois Election Code. "Diluting the weight of votes because of place of residence," it said at page 566, "impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race. . . ." Not place of residence but "population," this Court held at page 567, "is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies."

This Court has left no doubt as to how the issues in *MacDougall v. Green*, 335 U. S. 281 (1948), were to be decided under the law as stated in the *Reynolds* case. In footnote 40 at page 563 in the *Reynolds* case, the Court quoted as follows from Justice Douglas' dissent in the *MacDougall* case:

> (A) regulation . . . (which) discriminates against the residents of the populous counties of the state in favor of rural sections . . . lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.
>
> Free and honest elections are the very foundation of our republican form of government. . . . Discrimina-

> tion against any group or class of citizens in the exercise of these constitutionally protected rights of citizenship deprives the electoral process of integrity. . . .
>
> None would deny that a state law giving some citizens twice the vote of other citizens in either the primary or general election would lack that equality which the Fourteenth Amendment guarantees. . . . The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government.

Gray v. *Sanders*, 372 U. S. 368 (1963), held that the Georgia county-unit system in statewide primary elections was unconstitutional since it resulted in a dilution of the weight of some votes merely because of where the voters resided. As this Court said at pages 557-58:

> How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

Here, the geographical unit chosen for nomination and election of Presidential Electors is the State of Illinois. All registered voters must have equal power to nominate and elect, "wherever their home may be in the geographical unit."

In Illinois, the use of nominating petitions by independent candidates to obtain a place on the ballot under Article 10 of the Election Code is as much an integral part of the whole elective system as are the primary provisions for

established parties set out in Articles 7, 8, and 9 of that Code. Article 10 of the Illinois Election Code contains the only procedure for the nomination of candidates by voters who are not members of established political parties. It permits the formation of new parties and the nomination of independent candidates by nominating petitions.

The Illinois Supreme Court has recognized explicitly the role of the nominating process in the elective process. In *People* v. *Election Commissioners,* 221 Ill. 9, 18 (1906), the Court stated unequivocally:

> The right to choose candidates for public offices whose names will be placed on the official ballot is as valuable as the right to vote for them after they are chosen, *and is of precisely the same nature.* (Emphasis added.)

Similarly, in *People* v. *Fox,* 294 Ill. 263 (1920), the Illinois Supreme Court held the Primary Act of 1919 unconstitutional as contrary to Section 18 of Article II of the Illinois Constitution, saying at page 268:

> Section 18 of the bill of rights provides that all elections shall be free and equal. This language has been construed by this court as meaning that the vote of every qualified elector shall be equal in its influence with every other one. . . . It is well settled in this state that the term 'election' applies to a primary for the nomination of candidates as well as to the election of such candidates to office, and the right to choose candidates for public office, whose names are to be placed on the official ballot, has been held as valuable as the right to vote for them after they are chosen and is of precisely the same nature.

It is well settled that, where a party primary is an integral part of the procedure of election, the right to vote in a primary is a right protected by the United States Constitution. *United States* v. *Classic,* 313 U. S. 299, 314-318

(1941). In *Smith* v. *Allwright*, 321 U. S. 649, 664 (1944), this Court stated:

> When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election.

Following *Baker* v. *Carr*, 369 U. S. 186 (1962), this Court has applied the same tests to determine the character of discrimination or abridgment in statutes governing the nomination of candidates as in their election. As already noted, *Gray* v. *Sanders*, 372 U. S. 368 (1963), found unconstitutional a county-unit system in statewide primary elections. There, at pages 374-75, it was held that "state regulation of this preliminary phase of the election process makes it state action" within the meaning of the Fourteenth Amendment.

Williams v. *Rhodes* and *Socialist Labor Party* v. *Rhodes*, 89 S. Ct. 5 (1968) held that the Ohio election laws placed an unconstitutional burden on the rights of minority groups to obtain a place on the ballot. *Toombs* v. *Fortson*, 205 F. Supp. 248 (DC Ga., 1962), held unconstitutional a statute which rotated senatorial seats among the counties and permitted only voters in the county selecting the state senator to vote in the primary nominating the senator.[1] *Moore* v. *Moore*, 229 F. Supp. 435 (DC Ala., 1964), held unconstitutional a statute which provided for election of congressmen at-large but which provided for nomination of congressional candidates from districts with unequal populations.

As Justice Douglas stated in his dissent in *MacDougall* v. *Green*, 335 U. S. 281 (1948), at page 288:

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1. *Fortson* v. *Toombs*, 379 U. S. 621 (1965) vacated a part of the decree and remanded the case to the District Court for reconsideration of the desirability and need for the ongoing injunction.

> The protection which the Constitution gives voting rights covers not only the general election but also extends to every integral part of the electoral process, including primaries. (Citing cases.) When candidates are chosen for the general election by a nominating petition, that procedure also becomes an integral part of the electoral process. It is entitled to the same protection as that which the Fourteenth Amendment grants any other part.

Although the facts in the present case are virtually identical to those in *MacDougall* v. *Green*, the foregoing review of some of the leading cases subsequent to *Baker* v. *Carr* makes it evident that the holding in *MacDougall* no longer determines the issues in the present case. In *MacDougall* v. *Green*, this Court held at page 283:

> It is clear that the requirement of two hundred signatures from at least fifty counties gives to the voters of the less populous counties of Illinois the power completely to block the nomination of candidates whose support is confined to geographically limited areas. But the State is entitled to deem this power not disproportionate: of 25,000 signatures required, only 9,800, or 39%, need be distributed; the remaining 61% may be obtained from a single county. And Cook County, the largest, contains not more than 52% of the State's voters. It is allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality.

All that remains of that holding is the conclusion that the 1935 amendment does enable voters from less populous counties to block the nomination of candidates whose support is confined to a majority of the population which resides in geographically limited areas. It is no longer allowable State policy to permit a minority of the voters, simply because of where they reside, to block the nomination of candidates supported by a majority.

"Citizens," said the Court at page 580 in *Reynolds* v.

Sims, 377 U. S. 533 (1964), "not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations."

Since the "right to vote freely for a candidate of one's choice is of the essence of a democratic society," as this Court said at page 555 of *Reynolds* v. *Sims*, *supra*, then the method of choosing that candidate must meet the test of the equal protection clause of the Fourteenth Amendment. Under the 1935 amendment to Article 10 of the Illinois Election Code, petitions signed by every one of the 93.4 per cent of the state's qualified voters who reside in the most populous counties could not nominate a single candidate for Presidential Elector. On the other hand, petitions signed by 25,000 of the 6.6 per cent of the state's qualified voters properly distributed in fifty of the fifty-three least populous counties could nominate a complete slate of candidates. Such classification of voters on the basis of where they live is contrary to the equal protection clause of the Fourteenth Amendment and is, therefore, unconstitutional.

II.

The 1935 Amendment to Section 3 of Article 10 of the Election Code Requiring 200 Signatures from Each of 50 Counties to Nominate Candidates for Statewide Offices and Presidential Electors Constitutes an Arbitrary, Unreasonable, and Discriminatory Restriction on the Right of Illinois Voters to Nominate and Vote for Candidates of Their Own Choice.

As discussed above, the *sole* authority on which the three-judge court relied in upholding Section 3 of Article 10 has, through a long series of decisions of this Court, been thoroughly undercut. However, there are additional reasons which mitigate against the continued viability of the *MacDougall* case.

The requirement here in issue was added by amendment in 1935. *Laws*, 1935, p. 789. Before that amendment, the signatures required to nominate independent candidates for statewide offices, and for Presidential Electors, were counted on a statewide basis and only in terms of the total to be obtained: 25,000 signatures of qualified voters in the state. The requirement for nominating candidates of a new political party was identical.

The 1935 amendment added an additional and weighted requirement based on the place of residence of the registered voters. The 1935 amendment made it mandatory that the 25,000 qualified voters meet a further, and, in view of the population distribution in Illinois, highly unequal requirement as to their place of residence within the statewide geographical unit for which candidates were to be elected. The 25,000 signatures must include those of at least 200 qualified voters from each of 50 counties. In other words, under the 1935 amendment, the signatures of neither 25,000 qualified voters nor of 4,000,000 qualified voters will satisfy the statutory requirement for nomina-

tion of independent or new-party candidates unless they meet place-of-residence requirements contrary to the population-based requirements of the Fourteenth Amendment.

The distribution of population among the 102 Illinois counties shows the extent to which the 1935 amendment debases and dilutes the right of qualified voters to participate in the electoral process.

More than 50 per cent of the total Illinois population and more than 50 per cent of the Illinois registered voters reside in *one* county, Cook County.

Approximately 61 per cent of the Illinois registered voters reside in the state's *five* most populous counties: Cook, DuPage, Lake, Madison, and St. Clair.

Approximately 93.4 per cent of the Illinois registered voters reside in the state's *forty-nine* most populous counties: Cook, DuPage, Lake, Madison, St. Clair, Adams, Bureau, Champaign, Christian, Clinton, Coles, DeKalb, Franklin, Fulton, Hancock, Henry, Iroquois, Jackson, Jefferson, Kane, Kankakee, Knox, La Salle, Lee, Livingston, Logan, Macon, Macoupin, Marion, McDonough, McHenry, McLean, Montgomery, Morgan, Ogle, Peoria, Randolph, Rock Island, Saline, Sangamon, Shelby, Stephenson, Tazewell, Vermillion, Whiteside, Will, Williamson, Winnebago and Woodford.

Approximately 6.6 per cent of Illinois registered voters reside in the *fifty-three* remaining counties.

The 1935 amendment thus prevents the majority of the state's registered voters who reside in Cook County from nominating independent candidates for Presidential Electors and statewide offices or from forming a new political party in the state for those purposes.

The 1935 amendment also prevents the 61 percent of the state's registered voters who reside in Cook, DuPage, Lake, Madison, and St. Clair Counties from nominating independent candidates for Presidential Electors and state-

wide offices or from forming a new political party in the state for those purposes.

The 1935 amendment even prevents the 93.4 per cent of the state's registered voters who reside in the state's forty-nine most populous counties from nominating independent candidates for Presidential Electors and statewide offices.

But the 1935 amendment permits 25,000 of the remaining 6.6 per cent of the registered voters properly distributed among fifty of the fifty-three least populous counties to nominate such candidates or to form such a new party.

The effect of the 1935 amendment is drastically to debase the weight of a qualified voter in a populous county as against the weight of a qualified voter in the less populated counties. No number of additional signatures over and above the required 200 in a populous county can overcome the lack of 200 in one of the less populated counties. One qualified voter does not have the same right to nominate as every other qualified voter. His signature on a nominating petition counts only if he resides in the right county. And the smaller the population of the county in which he resides, the more his signature counts.

The grotesque nature of the 1935 amendment to Article 10 of the Illinois Election Code is illustrated by the fact that the voters of Cook County, since they outnumber the voters of all the rest of the counties put together, could elect the Presidential Electors, a United States Senator, and various statewide officers in the face of the united opposition of the voters of the other 101 counties. Indeed, the existence of such a possibility is required by the Fourteenth Amendment to the United States Constitution.

Nevertheless, although that majority can elect, under the Illinois Election Code it cannot nominate. Although the minority cannot elect, it can nominate.

In fact, the majority cannot really elect in Illinois. The power of a majority to elect must mean the power to elect candidates of its and not the minority's choice. Since the majority cannot nominate candidates without the support of the minority, it can only elect candidates the minority has also agreed to choose.

Indeed, since in Illinois the majority alone cannot nominate and the minority alone can nominate, it is possible for the only candidates on the ballot to have been nominated by the minority. The majority will thus have been effectively deprived of its vote and the minority will elect its candidates.

It is clear, therefore, that the 1935 amendment to Article 10 of the Illinois Election Code heavily overweighs the electoral power of voters residing in less populous counties and greatly underweighs the electoral power of voters residing in the populous counties. The 1935 amendment deviates drastically from the rule of one man, one vote.

The three-judge court seeks solace from these inescapable facts in this Court's decision in *Dusch* v. *Davis*, 387 U. S. 112 (1967). In that case, this Court upheld a so-called "Seven-Four Plan" establishing residency requirements for prospective candidates for the City Council of a governmental unit of seven boroughs composed of what had formerly been the City of Virginia Beach and Princess Anne County. However, the crucial distinction between that case and the one at bar was emphasized by Mr. Justice Douglas, writing for the Court, when he noted that "the plan uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or representation.' " 387 U. S. at 115. The provision of the Illinois Election Code here under attack does not establish residency requirements for candidates seeking statewide office. Rather, it directly affects the weight of the vote of citizens of the state based on their respective places of residence. It thus suffers

the precise infirmity which Justice Douglas failed to find in the *Dusch* case. It is submitted that the distinction between the two cases is obvious.

III.

The Invalidation of the 1935 Amendment Would Leave the Illinois Election Code Intact in Its Original Form. Appellants Have Fulfilled the Constitutional Requirements of That Code.

The only provision assailed as unconstitutional in this suit is the 1935 amendment to Article 10 of the Illinois Election Code which requires that 200 signatures be obtained from each of 50 counties. The invalidation of this amendment as unconstitutional would not nullify the entire Illinois Election Code. Instead, it would leave the legislation intact in its original form. *People* v. *Alteric*, 356 Ill. 307 (1934). The Code would then require that 25,000 qualified voters sign a petition to nominate independent candidates for Presidential Electors regardless of their place of residence.

Appellants presented such a petition to the State Electoral Board. That Board refused to certify Appellants to the county clerks solely because the petition failed to satisfy the unconstitutional place of residence requirements of the 1935 amendment. (Exhibit A to Complaint, Appendix, pp. 21-23.) Appellants, therefore, had fulfilled the constitutional statutory requirements for certification and should have been certified to the county clerks as candidates for Electors of President and Vice President of the United States.

CONCLUSION.

The cases of *Baker* v. *Carr*, 369 U. S. 186 (1962), *Gray* v. *Sanders*, 372 U. S. 368 (1963) and *Reynolds* v. *Sims*, 377 U. S. 533 (1964), as well as the many election cases which have followed, have settled that the district courts have jurisdiction of a suit such as this which attacks a state statute as unconstitutional on the ground that it deprives persons of equal protection of the laws by debasing and diluting their right to nominate and vote; that such suits state a justiciable cause of action; that persons such as Appellants have standing in such suits to challenge state statutes as unconstitutional for violating the Fourteenth Amendment; and that declaratory and injunctive relief are appropriate remedies in such suits.

For all of the reasons stated above, Appellants respectfully submit that their prayer for declaratory and injunctive relief as set forth in their Complaint should have been granted and that the three-judge court erred in dismissing the cause.

It is, of course, too late for Appellants to be placed on the 1968 presidential ballot. Appellants challenged the validity of Section 3 of Article 10 of the Illinois Election Code as expeditiously as possible in view of that Code's provisions with respect to the time for filing nominating petitions. This Court denied Appellants' "Motion to Advance and Expedite the Hearing and Disposition of This Cause" because of the representations of the State of Illinois that "it would be a physical impossibility for the State to effectuate the relief which the appellants seek."

There is no election-year method of challenging the validity of the Election Code other than the one adopted by Appellants. Because of the Code's provisions with respect to the time for filing nominating petitions, a similar

challenge in 1970 or 1972 will be met with the identical representation by the State of the "physical impossibility for the State to effectuate the relief" of placing the names of independent candidates on the ballot. The overriding issue of the unconstitutionality of the Code provision which heavily overweights the electoral power of voters residing in less populous counties has survived the 1968 election. That provision will deprive the majority of Illinois voters of their right to an equal vote in subsequent elections unless this Court reverses the decision of the three-judge court.

Respectfully submitted,

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